Supplementary Submission in response to matters raised in Senate Committee hearings into the Fair Work Bill 2008

David Peetz

This supplementary submission responds principally to issues raised in the hearings on 27 January 2008 and which I agreed to take on notice and respond at a later date, as well as to some commentary on my research earlier that day and further consideration in relation to some of the issues raised in my submision.

1. Disability

Senator Abetz enquired as to the definition of disability that would be appropriate to use, including the UK definition, were the right to request flexible hours be extended to parents of children with a disability.

In the Commonwealth ***Disability Discrimination Act 1992***, the following definition appears (section 4):[1]

> "disability" in relation to a person, means:
>
> > (a) total or partial loss of the person's bodily or mental functions; or
> > (b) total or partial loss of a part of the body; or
> > (c) the presence in the body of organisms causing disease or illness; or
> > (d) the presence in the body of organisms capable of causing disease or illness; or
> > (e) the malfunction, malformation or disfigurement of a part of the person's body; or
> > (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
> > (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
>
> and includes a disability that:
> > (h) presently exists; or
> > (i) previously existed but no longer exists;
> > (j) may exist in the future; or
> > (k) is imputed to a person.

In the UK ***Disability Discrimination Act 1995***, 'disability' is defined thus in section 1:[2]

> Meaning of "disability" and "disabled person"
>
> (1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

[1] http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/s4.html
[2] http://www.opsi.gov.uk/acts/acts1995/ukpga_19950050_en_2

(2) In this Act "disabled person" means a person who has a disability.

While this appears much simpler, the provisions of Schedule 1, to which Subsection 1(1) refers, are quite detailed:[3]

SCHEDULE 1 PROVISIONS SUPPLEMENTING SECTION 1

Impairment

1 (1) “Mental impairment” includes an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognised illness.

(2) Regulations may make provision, for the purposes of this Act—

(a) for conditions of a prescribed description to be treated as amounting to impairments;

(b) for conditions of a prescribed description to be treated as not amounting to impairments.

(3) Regulations made under sub-paragraph (2) may make provision as to the meaning of “condition” for the purposes of those regulations.

Long-term effects

2 (1) The effect of an impairment is a long-term effect if—

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring shall be disregarded in prescribed circumstances.

(4) Regulations may prescribe circumstances in which, for the purposes of this Act—

(a) an effect which would not otherwise be a long-term effect is to be treated as such an effect; or

(b) an effect which would otherwise be a long-term effect is to be treated as not being such an effect.

Severe disfigurement

3 (1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.

(2) Regulations may provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect.

[3] http://www.opsi.gov.uk/acts/acts1995/ukpga_19950050_en_10#sch1

(3) Regulations under sub-paragraph (2) may, in particular, make provision with respect to deliberately acquired disfigurements.

Normal day-to-day activities

4 (1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following—

(a) mobility;

(b) manual dexterity;

(c) physical co-ordination;

(d) continence;

(e) ability to lift, carry or otherwise move everyday objects;

(f) speech, hearing or eyesight;

(g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger.

(2) Regulations may prescribe—

(a) circumstances in which an impairment which does not have an effect falling within sub-paragraph (1) is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities;

(b) circumstances in which an impairment which has an effect falling within sub-paragraph (1) is to be taken not to affect the ability of the person concerned to carry out normal day-to-day activities.

Substantial adverse effects

5 Regulations may make provision for the purposes of this Act—

(a) for an effect of a prescribed kind on the ability of a person to carry out normal day-to-day activities to be treated as a substantial adverse effect;

(b) for an effect of a prescribed kind on the ability of a person to carry out normal day-to-day activities to be treated as not being a substantial adverse effect.

Effect of medical treatment

6 (1) An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.

(2) In sub-paragraph (1) “measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person’s sight, to the extent that the impairment is, in his case, correctable by spectacles or contact lenses or in such other ways as may be prescribed; or

(b) in relation to such other impairments as may be prescribed, in such circumstances as may be prescribed.

Persons deemed to be disabled

7 (1) Sub-paragraph (2) applies to any person whose name is, both on 12th January 1995 and on the date when this paragraph comes into force, in the register of disabled persons maintained under section 6 of the [1944 c. 10.] Disabled Persons (Employment) Act 1944.

(2) That person is to be deemed—

(a) during the initial period, to have a disability, and hence to be a disabled person; and

(b) afterwards, to have had a disability and hence to have been a disabled person during that period.

(3) A certificate of registration shall be conclusive evidence, in relation to the person with respect to whom it was issued, of the matters certified.

(4) Unless the contrary is shown, any document purporting to be a certificate of registration shall be taken to be such a certificate and to have been validly issued.

(5) Regulations may provide for prescribed descriptions of person to be deemed to have disabilities, and hence to be disabled persons, for the purposes of this Act.

(6) Regulations may prescribe circumstances in which a person who has been deemed to be a disabled person by the provisions of sub-paragraph (1) or regulations made under sub-paragraph (5) is to be treated as no longer being deemed to be such a person.

(7) In this paragraph—

"certificate of registration" means a certificate issued under regulations made under section 6 of the Act of 1944; and

"initial period" means the period of three years beginning with the date on which this paragraph comes into force.

Progressive conditions

8 (1) Where—

(a) a person has a progressive condition (such as cancer, multiple sclerosis or muscular dystrophy or infection by the human immunodeficiency virus),

(b) as a result of that condition, he has an impairment which has (or had) an effect on his ability to carry out normal day-to-day activities, but

(c) that effect is not (or was not) a substantial adverse effect,

he shall be taken to have an impairment which has such a substantial adverse effect if the condition is likely to result in his having such an impairment.

(2) Regulations may make provision, for the purposes of this paragraph—

(a) for conditions of a prescribed description to be treated as being progressive;

(b) for conditions of a prescribed description to be treated as not being progressive.

Probably the simplest approach, and one that would maintain consistency across legislation, would be to stick to the Australian definition and so to include in the dictionary in section 12 a provision along the lines of

> ***disabled child*** means a child with a disability as defined in section 4 of the *Disability Discrimination Act 1992*

2. Reasonable business grounds

Senator Crossin asked whether there was case law that has touched on what might be defined as reasonable business grounds, in relation to the right to request flexible work arrangements.

There has been some case law in discrimination law in this general area on the concept of 'reasonableness', which is a 'broader test' than 'reasonable business grounds'.[4] In a 1989 judgement Bowen CJ & Gummow J stated that

> the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience…[it] requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.[5]

While the 'evaluation is meant to be a balancing exercise, with the employer's goals and business needs to be weighed against the impact of the requirement on the employee and others',[6] practical implementation has depended on individual judges. In *State of Victoria v Schou,*[7] for example, a tribunal decision in favour of a Hansard reporter with young children experiencing health problems and separation anxiety, who complained she had been discriminated against by her employer's refusal to allow her to work part-time or from home, was overturned on appeal. The Appeal Court found that the tribunal had focused too much on the feasibility of the alternative work arrangements proposed by the worker and that the existence of a feasible alternative did not make the employer's refusal to accommodate it unreasonable; it was only relevant where the alternative offered was 'as efficacious or as suited to the task' as the actual work requirement.[8] Smith argued that in this case 'there was no weighing up'.[9]

The concept of 'reasonable business grounds', it should be noted, is narrower than that of 'reasonable in all the circumstances', appearing to require no consideration of the circumstances of the employee.

---

[4] Bennett, S. & R. Cornes (2008). The codification of a limited entitlement to flexible working arrangements and consequent restriction on the development of the entitlement under Discrimination legislation. *Labour Law under a Labor Government: A New Balance in the Workplace?* Melbourne, Fourth biennial conference, Australian Labour Law Association. 14-15 November. 491-497. p493.

[5] Bowen CJ & Gummow, J in *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251, cited in Smith, B. .National Employment Standards, Right to Request Flexible Working Arrangements - What does it add to existing rights? *Labour Law under a Labor Government: A New Balance in the Workplace?* Melbourne, Fourth biennial conference, Australian Labour Law Association. 14-15 November.**:** 343-356.

[6] Smith, Ibid. p352.

[7] *State of Victoria v Schou* [2004] VCSA 71.

[8] cited in Bennett & Cornes The codification of a limited entitlement.

[9] Smith, B. National Employment Standards, Right to Request, p354.

3. Pregnancy and dismissal

Senator Crossin sought my view on a submission that dismissal on the grounds of pregnancy was not automatically unlawful. Clause 351 states that:

> (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of…pregnancy

Clause 342 defines 'adverse action' as including dismissal of an employee. There are some limited exemptions to this protection against adverse action, where under sub-clause 351(2), the action is authorised under state anti-discrimination laws, or taken 'because of the inherent requirements of the particular position concerned' or

> (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:
> (i) in good faith; and
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

These exemptions are similar to those applying under s659 of the Workplace Relations Act. While termination on the grounds of pregnancy is not therefore automatically unlawful, the circumstances under which it would be permitted would be rare.

4. Registration of individual flexibility arrangements

Senator Siewert asked whether I was confident that it was acceptable that individual flexibility arrangement under awards did not need to be registered and therefore were not open to some sort of review.

Because individual flexibility arrangement must make employees better off overall than the relevant award (or enterprise agreement) and cannot preclude an enterprise agreement from being negotiated, the scope for abuse through individual flexibility arrangement is not comparable to that which was provided by Australian Workplace Agreements (AWAs). That said, particularly in the context of a declining labour market in the face of the global financial crisis, there is a genuine danger that individual flexibility arrangements could be abused in some circumstances. However, an approval process (as applied to AWAs before 'WorkChoices' and then under the 'fairness test') would be administratively costly and probably counter to the policy intention.

It is important that the Fair Work Ombudsman (FWO) have ready access to any individual flexibility arrangements to ensure that they are being complied with and do not breach the better off overall test (the 'BOOT' test). Clause 535 requires an employer to keep prescribed records. The regulations should specify that any individual flexibility arrangements applying in a workplace be kept on file with the time and wages records.

Before undertaking an inspection, an FWO inspector would have access to any awards and enterprise agreements that apply in a workplace. These are generally available electronically. To expedite efficient inspections, it might also make sense for the FWO to have prior access to any individual flexibility arrangements that apply in the workplace – that is, for employers to provide FWO (or a registry linked to FWO) with copies of individual flexibility arrangements after they are signed. This would not be for the purposes of approval, but

rather for the purposes of promoting efficient inspections. To have any impact, such lodgement of arrangements would need to be mandatory.

This would incur an administrative cost which would have to be considered and balanced against the benefits. The cost would not be trivial, but could be minimised by encouraging electronic submission and storage of the text of the arrangements – most businesses would create these documents electronically and/or be capable of scanning them. The budget of the FWO would need to be sufficient to enable a registry to be maintained without compromising the enforcement functions of FWO. A significant advantage is that a lodgement system may also provide an indicator that would point to areas where FWO may need to concentrate inspections, if a series of related questionable individual flexibility arrangements were lodged.

In terms of its obligations to report on agreements (clause 653), the General Manager should include in these reports information about the content of individual flexibility arrangements, based on a sample of them. Public interest in such agreements will be more significant now that AWAs have been abolished. This would be perhaps the most useful form of review of individual flexibility arrangements. A lodgement system with FWO would facilitate such reporting, and independent research on individual flexibility arrangements, and enable policy makers including Senators to form a view on whether individual flexibility arrangements were achieving their policy objectives. If a lodgement system were not implemented, an alternative (albeit inferior) approach would be for FWO inspectors to collect copies of individual flexibility arrangements when they undertake random inspections. Another would be for copies to be collected and analysed as part of a workplace survey associated with the report (see paragraphs 104 and 107 of my main submission).

5. Rosters and leave in the mining sector

Senator Siewert asked about my views on claims by the Australian Mines and Metals Association (AMMA) that various provisions in the Bill discriminated against the resources sector because of the way they run their rosters.

AMMA's submission in this area had three main elements.

First, that the 26 week averaging period could not accommodate the Norwegian roster "which is a 28 week roster",[10] worked in some sections of the resources industry, particularly offshore drilling and exploration.

It should be pointed out that a 26 week averaging period would not prevent a company from running a 28 week roster. It would just mean, in effect, that they had to pay appropriate penalty rates, or an equivalent allowance, to the extent that hours exceeded the average.

More importantly, as pointed out by AMMA's submission to the exposure draft of the National Employment Standards, the Norwegian roster comprises one where "employees work 3 weeks on, 3 weeks off, 3 weeks on and six weeks off",[11] a fact confirmed by other

[10] Australian Mines and Metals Association (2009). Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008. Melbourne, AMMA. January. p44
[11] Australian Mines and Metals Association (2008). National Employment Standards Exposure Draft Submission. Melbourne, AMMA. March. p3.

sources.[12] That is, it is in fact a *15 week roster cycle.* Accordingly, the NES requirement for averaging over no more than 26 weeks does not present a problem for the Norwegian roster.

Second, AMMA suggested that resource companies should be able to require employees to take their annual leave during their days off, and accordingly employees should also be able to cash out all their annual leave.

There is no need for employers to be able to require employees to take their annual leave during their days off. Workers on the Norwegian roster already, in effect, take some annual leave every fifteen weeks – about three weeks leave (above and beyond the days off that would be available under an even time roster),[13] which includes about 4 days travel time plus public holidays, so it works out at a little under two weeks effective annual leave per cycle.[14] Thus the Norwegian roster is able to be easily accommodated under the schema of the Fair Work Bill. This is because the Norwegian roster is not an even time roster – it provides for more weeks off duty than on duty.

For workers under a conventional even time roster (say on a 16 day cycle)[15], enabling resource employers to require employees to take their annual leave during their time off would be the same as removing their annual lave entitlement altogether. It would have the same effect as saying that employees in the resource industry were not entitled to annual leave, even though they worked an average of 44 hours per week.

For employees on asymmetric rosters – working say 14/7 (14 days on and 7 days off) or 21/7 or even 12/2 rosters – which are more common in the WA resources sector outside the offshore installations, the effect would be even worse because they would lose their annual leave entitlement despite working considerably more than an average 44 hour week.

Employees on even time rosters – many of which only provide for maximum breaks of four or five days – are entitled to annual leave as much as anyone else and should not be forced in effect to cash out their leave because the employer wants them to work on days that would otherwise be their holidays.

AMMA's third proposal – to enable employers to set a standard work 12-hour day as of right – seeks to circumvent standards that have been in awards for many years. Its effect would be to remove the component of compensation for overtime or penalty rates from workers on 12

---

[12] eg a job advertised on Career One for an Offshore Installation Manager based in WA describes the job as having "a Norwegian Roster (3/3/3/6)".
http://jobs.careerone.com.au/texis/jobsearch/details.html?id=4981901148d580. See also eg Farrelly, B. (2008). "Offshore Workers Voice." from http://www.mua.org.au/news/general/Hydronews.html.

[13] Under an even time roster, employees in a shift cycle the same number of 12-hour days as they have days off (eg a 16 day cycle is often 4 days on, 4 off, 4 nights on, 4 off). This averages out at around 44 hours per week, ie an average 6 hours of compulsory overtime per week.

[14] This is explained in the Four Vanguard Woollybutt FPSO Agreement 2006 – 2009, which states (clause 7), 'The Four Vanguard roster system is a variation on the Norwegian Roster as follows: Employees shall work a roster of 3 weeks on followed by 3 weeks off, however, in every 15 week cycle, will incorporate the accrual and aquittal of annual leave , public holiday, and travel time concepts.' Similarly, the BHP Billiton Petroleum Pty Ltd Griffin Venture Operations Workplace Agreement states that "The Griffin Venture roster cycles incorporate all leave entitlements including annual leave, long service leave, public holidays, overcycle leave and time spent travelling joining/leaving the facility in off duty time. It is a variation on the Norwegian Roster having a pattern averaging two (2) weeks of work and three (3) weeks off roster for every five (5) calendar weeks.'
http://www.workplaceauthority.gov.au/%5Cdocs%5CCAs%5CCAUN085171660.pdf

[15] see footnote 13

hour rosters. It is worth noting that one reason for high wages in the mining sector is the fact that most (but not all) mines operate on 12 hour shifts, and mining companies are required to compensate employees for the long hours involved. Making ordinary time rates of pay apply to 12 shift shifts would simply reduce the pay entitlements of mining employees.

It is somewhat misleading to say that the proposed provisions in the Bill and the award would mean that "any current business that works 12-hour shifts that does not have an industrial agreement in place which provides for 12-hour shifts will not be able to continue to work its current arrangements"[16]. The provisions principally mean that employers would have to pay the appropriate shift premiums. Those that were able to reduce pay and conditions through the provisions of WorkChoices that removed the 'no disadvantage' test from agreements would find that they lost that temporary advantage. If an employer wants to have employees work 12 hour shifts, it is only appropriate that employees be asked to give their consent. This is especially the case as there are a number of health, safety, family and social issues associated with shiftwork and particularly 12 hour shifts with asymmetric rosters. [17]

6. Productivity study

In relation to research I had undertaken, Senator Furner asked Mr Platt from AMMA:

> Can I take you to some contemporary evidence by Professor Peetz, in particular the study *Is individual contracting more productive?* In that research he found in fact that Tseng and Wooden, who looked at productivity levels in Australian firms, had found that the combined effects of union membership and collective agreements produced higher productivity levels than the combined effect of individual contracting and nonunionism. Also, Wooden went on to find that unions apparently are good for productivity but only at workplaces where unions are active. I am just wondering what your response is in relation to that with regard to your apparent view that it is going to somehow reduce productivity and efficiency in workplaces.

Mr Platt responded:

> The issue with the work done by Peetz is that in principle he relies on a comparison of collective arrangements in the coal industry with some individual arrangements in a small sector of the hard-rock sector. If you have ever visited a coalmine after you remove the overburden, coal is just lying around ready for you to shovel it up and put it into a big bucket and send it overseas. That is not the case with a goldmine where you have to do a lot of work to get a pea of gold out of every tonne, and on the question about productivity it is very difficult to compare apples and oranges in that case. I think that Professor Peetz's analysis ought to be considered with those facts in mind.

---

[16] Hansard, Senate Committee, 27 January 2009, pEEWR 9

[17] eg Rosa, R. R. (1995). "Extended workdays and excessive fatigue." *Journal of Sleep Research* **4**(Supplement 2): 51-56. , Dawson, D. & K. Reid (1997). "Fatigue, alcohol and performance impairment." *Nature* **388**: 1-3. 17th July. , Hattery, A. J. & R. G. Merrill (1997). The impact of non-day and non-overlapping shift work on child development and marital quality: a preliminary analysis. *American Sociological Association paper*. Department of Sociology, Ball State University, Olsen, L. & A. Ambrogetti (1998). "Working harder-working dangerously? Fatigue and performance in hospitals." *Medical Journal of Australia* **168**: 614-616. , Heiler, K., R. Pickersgill & C. Briggs (2000). Working time arrangements in the Australian mining industry Geneva, International Labour Organisation (ILO). Sectoral Activities Programme. October, Heiler, K. (2002). The Struggle for Time: A review of extended shifts in the Tasmanian mining industry, Overview Report, A report prepared for the Tasmanian Government, ACIRRT, Akerstedt, T. (2003). "Shift work and disturbed sleep/wakefulness." *Occupational Medicine* **53**: 89-94.

Mr Platt appears to have confused my study[18] with something else, perhaps by another person or organisation. The point of the question concerned the study by Tseng and Wooden which I cited in my 2005 paper referred to by Senator Furner. Tseng and Wooden looked at enterprise bargaining and productivity levels in Australian firms using the business longitudinal survey, and found that productivity levels in firms with individual contracts were 4 to 10 per cent higher than those with award-only coverage, but productivity was also higher by a similar amount (5 to 9 per cent) in firms with registered collective agreements, when controlling for union membership. In addition, firms with high rates of union membership were 5 to 7 per cent more productive than firms with no union members.[19] Their study makes no explicit comparison between productivity in the coal and hard rock industries; it was not the focus of any of their analysis.

My own paper was an analysis of the literature as it stood and made only a passing reference to coal productivity, essentially pointing to errors in a publication by the Business Council of Australia (BCA),[20] which asserted that the high rate of productivity growth in the mining sector over the period 1994-2002 was being driven by the industry's use of individual contracting, thereby allegedly demonstrating the productivity benefits of individual contracting. I pointed out that the unionised coal industry also had high rates of productivity growth over a comparable period. More relevant and compelling, however, was the point I made directly afterwards – that the BCA had ignored more recent data which showed the opposite of the BCA's central claim. That is, mining 'had the *lowest* rate of productivity growth over the most recent eight years, one that was only a quarter of the national average growth rate over the period.'[21] Mr Pratt's commentary is irrelevant to this observation and indeed to the other key points made in my paper and in that by Tseng and Wooden.

7. Functions of the Fair Work Ombudsman and Fair Work Australia

In my main submission I proposed amendments aimed at ensuring that the 'education' function of the FWO does not gradually take de facto precedence over its enforcement functions. Following further consideration of the issue, I believe the resolution to this potential problem is best achieved through a different amendment.

As pointed out, in clause 682, the stated functions of the Fair Work Ombudsman (FWO) include:

> (a) to promote:
>
> (i) harmonious and cooperative workplace relations; and
>
> (ii) compliance with this Act and fair work instruments;
>
> including by providing education, assistance and advice to employees, employers and organisations;

I noted a problem with 'education' as being a stated function of FWO. However, the core problem really concerns the type of education. Education about the need for compliance with

[18] Peetz, D. (2005, 21 June). "Is individual contracting more productive?" *Industrial Relations Report Card*, from http://www.econ.usyd.edu.au/content.php?pageid=14896.

[19] Tseng, Y.-P. & M. Wooden (2001). Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey. *Melbourne Institute Working Paper No 8/01*. Melbourne, Melbourne Institute of Applied Economic and Social Research, University of Melbourne. July.:25,29.

[20] Business Council of Australia (2005). Workplace relations action plan: For future prosperity. Melbourne, BCA. February.

[21] Peetz. "Is individual contracting more productive?", p11

the Act and fair work instruments is an appropriate and in many instances necessary function for FWO. What is not appropriate is education in relation to 'harmonious and cooperative workplace relations'. Indeed asking FWO to undertake both of functions (i) and (ii) is to create a major **role ambiguity** for it that was a major factor in the decline of effective inspection during the 1990s. I agree with the submission by Carolyn Sutherland, Anthony Forsyth and Chris Arup from the Workplace and Corporate Law Research Group at Monash University that, whilst Fair Work Australia (FWA) must perform its functions in a manner that promotes harmonious and cooperative workplace relations, it is an error to give that function to the Ombudsman under the Bill. I agree that

> This type of role would be more appropriately located within FWA, rather than within the Fair Work Ombudsman. The promotion of harmonious and cooperative workplace relations sits uncomfortably with a body such as the Fair Work Ombudsman that is likely to be predominantly compliance-focused…It would be preferable, in our view, to establish a separate division of FWA to provide specialist dispute prevention services of this nature.[22]

Accordingly, clause 682 should be amended by deleting reference to FWO promoting harmonious and cooperative workplace relations, and qualifying the reference to education, so that the first functions of OWS should read:

> (a) to promote compliance with this Act and fair work instruments; including by providing education, assistance and advice to employees, employers and organisations about compliance with the Act;

Subclause 577(2) concerning the functions of FWA should also be amended, to include the word 'education' before 'assistance', and by adding the following function proposed to be deleted from that of FWO:

> (c) promoting harmonious and cooperative workplace relations

I also note that experience dating back many years shows that where a single breach is shown to exist there is an increased likelihood that other breaches will exist – either a similar breach relating to other employees and/or non-compliance with other entitlements.[23] Given that the Bill enables certain union officials to have a role in enforcement of industrial rights through inspection, consistent with practice through most of the past century, it would make sense, once a suspected breach is confirmed, to then allow such an official to widen the inspection to other entitlements and other workers.

8. Appointment of members of FWA

In my oral submission, I spoke of the process for appointing members of FWA, and focused on the desirability of implementing the policy set out in the *Forward with Fairness Implementation Plan*, which states:

---

[22] Sutherland, C., A. Forsyth & C. Arup (2009). Submission to the Senate Education, Employment and Workplace Relations Committee – Inquiry into the Fair Work Bill 2008. Melbourne, Department of Business Law and Taxation, Monash University. p7.

[23] Goodwin, M. (2003). The Great Wage Robbery: Enforcement of minimum labour standards in Australia. *unpublished PhD thesis, School of Industrial Relations and Organisational Behaviour*, . Sydney, The University of New South Wales.

> Fair Work Australia will be independent of unions, business and government because appointments will not favour one side over another.
>
> Labor will achieve this by requiring that the Minister responsible for Employment and Industrial Relations will only be able to make an appointment after completing the following processes.
>
> The shortlist of candidates will be scrutinised by a panel comprising:
>
> • a senior official from the Department of Employment and Industrial Relations (who will chair the panel);
>
> • a senior official from the Australian Public Service Commission; and
>
> • a senior official from each State (and Territory) Department of Industrial Relations that wishes to participate.
>
> The Minister will be required to consult with the opposition spokesperson for industrial relations and the head of Fair Work Australia prior to making any decision about appointments to recommend to Cabinet.
>
> Labor's process will be rigorous and provide for bipartisan involvement. It will ensure that all appointments made to Fair Work Australia are themselves fair, balanced and made on merit alone.[24]

I recommended that, accordingly, clause 627 should include a subclause (5), 'Consultation', which should state:

> Before the Governor General appoints a person to Fair Work Australia, the Minister must ensure that consultation has occurred with each of the following:
>
> (a) the Department;
>
> (b) the Australian Public Service Commission;
>
> (c) officials from each relevant State and Territory Department that wishes to be consulted;
>
> (d) the relevant member of the Opposition;
>
> (e) the President of Fair Work Australia

Since then, discussions with colleagues and some recently published research[25] have alerted me to another issue in the appointment of persons to FWA. This also relates to proposals made in some submissions[26] for the appointment of a specialist commissioner for equal remuneration and their inclusion in any minimum wages panel. I agree that the extent to which FWA is able to effectively deal with equal remuneration issues will depend on the expertise of members of FWA and its structure. To ensure that the relevant expertise is held in FWA, sub-clause 627(4), which specifies four fields of expertise in which one or more members of the Minimum Wages Panel of FWA must have expertise (workplace relations; economics; social policy; and business, industry or commerce) should be amended to include a fifth area of expertise:

> (e) equal remuneration for work of equal value between men and women

---

[24] p25

[25] Junor, A., S. Hammond & L. Taksa (2009). Forward with (Gender Pay) Fairness? *Labour, Capital and Change: Proceedings of the 23rd Conference, Volume 1: Refereed Papers.* J. Lewer, S. Ryan and J. Macneil. Newcastle, Association Of Industrial Relations Academics Of Australia And New Zealand. 4-6 February.

[26] eg National Pay Equity Coalition & Women's Electoral Lobby Australia Inc (2009). Submission: Senate Standing Committee On Education Employment And Workplace Relations Committee Inquiry Into Fair Work Bill 2008 Sydney.

This would ensure that at least one member of the Minimum Wage Panel was skilled in relation to equal remuneration issues. There would also be benefit is establishing an equal remuneration unit within the administrative support structure for FWA, though this would be a matter for administration rather than legislation.

Griffith University
February 2009

References

Akerstedt, T. (2003). "Shift work and disturbed sleep/wakefulness." *Occupational Medicine* **53**: 89-94.

Australian Mines and Metals Association (2008). National Employment Standards Exposure Draft Submission. Melbourne, AMMA. March.

Australian Mines and Metals Association (2009). Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008. Melbourne, AMMA. January.

Bennett, S. & R. Cornes (2008). The codification of a limited entitlement to flexible working arrangements and consequent restriction on the development of the entitlement under Discrimination legislation. *Labour Law under a Labor Government: A New Balance in the Workplace?* Melbourne, Fourth biennial conference, Australian Labour Law Association. 14-15 November. 491-497.

Business Council of Australia (2005). Workplace relations action plan: For future prosperity. Melbourne, BCA. February.

Dawson, D. & K. Reid (1997). "Fatigue, alcohol and performance impairment." *Nature* **388**: 1-3. 17th July.

Farrelly, B. (2008). "Offshore Workers Voice." from http://www.mua.org.au/news/general/Hydronews.html.

Goodwin, M. (2003). The Great Wage Robbery: Enforcement of minimum labour standards in Australia. *unpublished PhD thesis, School of Industrial Relations and Organisational Behaviour, .* Sydney, The University of New South Wales.

Hattery, A. J. & R. G. Merrill (1997). The impact of non-day and non-overlapping shift work on child development and marital quality: a preliminary analysis. *American Sociological Association paper*. Department of Sociology, Ball State University.

Heiler, K. (2002). The Struggle for Time: A review of extended shifts in the Tasmanian mining industry, Overview Report, A report prepared for the Tasmanian Government, ACIRRT.

Heiler, K., R. Pickersgill & C. Briggs (2000). Working time arrangements in the Australian mining industry Geneva, International Labour Organisation (ILO). Sectoral Activities Programme. October.

Junor, A., S. Hammond & L. Taksa (2009). Forward with (Gender Pay) Fairness? *Labour, Capital and Change: Proceedings of the 23rd Conference, Volume 1: Refereed Papers*. J. Lewer, S. Ryan and J. Macneil. Newcastle, Association Of Industrial Relations Academics Of Australia And New Zealand. 4-6 February.

National Pay Equity Coalition & Women's Electoral Lobby Australia Inc (2009). Submission: Senate Standing Committee On Education Employment And Workplace Relations Committee Inquiry Into Fair Work Bill 2008 Sydney.

Olsen, L. & A. Ambrogetti (1998). "Working harder-working dangerously? Fatigue and performance in hospitals." *Medical Journal of Australia* **168**: 614-616.

Peetz, D. (2005, 21 June). "Is individual contracting more productive?" *Industrial Relations Report Card*, from http://www.econ.usyd.edu.au/content.php?pageid=14896.

Rosa, R. R. (1995). "Extended workdays and excessive fatigue." *Journal of Sleep Research* **4**(Supplement 2): 51-56.

Smith, B. (2008). National Employment Standards, Right to Request Flexible Working Arrangements - What does it add to existing rights? *Labour Law under a Labor Government: A New Balance in the Workplace?* Melbourne, Fourth biennial conference, Australian Labour Law Association. 14-15 November. 343-356.

Sutherland, C., A. Forsyth & C. Arup (2009). Submission to the Senate Education, Employment and Workplace Relations Committee – Inquiry into the Fair Work Bill 2008. Melbourne, Department of Business Law and Taxation, Monash University.

Tseng, Y.-P. & M. Wooden (2001). Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey. *Melbourne Institute Working Paper No 8/01*. Melbourne, Melbourne Institute of Applied Economic and Social Research, University of Melbourne. July.